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Bureau / Office

Ms. Amelia Brown
Disability Rights Office
Consumer & Governmental Affairs Bureau,
Federal Communications Commission

THOMPSON HINE LLP

1920 N STREET, N.W. WASHINGTON, D.C. 20036-1600

December 27, 2005

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: Petition for Exemption from Closed Captioning Requirements based on Undue Burden

Dear Ms. Dortch:

On December 21, 2005, KVMD Licensee Co., LLC ("KVMD"), the permittee of Station KVMD-DT, Twentynine Palms, California (the "Station"), filed a request for waiver of the January 1, 2006 deadline for the closed captioning of one hundred percent (100%) of new English-language programming as well as any 100% deadlines that may be applicable to Stations that broadcast bilingual as well as multilingual programming ("Waiver Request"). The Waiver Request is attached hereto as Attachment 1.

KVMD now requests that the portion of its Waiver Request addressing the absence of appropriate regulatory classifications for broadcast television stations that broadcast programs containing both English-language and Spanish-language segments as well as English-language programs and Spanish-language programs be treated as a petition for exemption from the closed captioning requirements based on "undue burden," pursuant to Section 79.1(f) of the Commission's Rules.

As set forth in the Waiver Request, KVMD's efforts to close caption its bilingual programming have been frustrated by the lack of clear regulations combined with underdeveloped markets for the closed captioning of Spanish-language and mixed English-Spanish-language programming. These conditions amount to a "significant difficulty," as that term is used in Section 79.1(f)(2) of the Commission's Rules, and KVMD should therefore be exempt from any closed captioning obligations it may have with respect to its bilingual programming.

A Declaration of an officer of KVMD is attached hereto as Attachment 2.

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Should there be any questions in regard hereto, please communicate with the undersigned.

Respectfully submitted,

KVMD LICENSEE CO., LLC

By: 

Barry A. Friedman

cc: Ms. Amelia Brown, Disability Rights Office, Consumer & Governmental Affairs Bureau,
Federal Communications Commission
Mr. Ronald L. Ulloa

ATTACHMENT 1

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of)	
)	
Closed Captioning of Video Programming)	CG Docket No. 05-231
)	
Telecommunications for the Deaf, Inc.)	
Petition for Rulemaking)	
)	
To: The Secretary		

REPLY COMMENTS

KVMD Licensee Co., LLC ("KVMD"), the permittee of Station KVMD-DT, Twentynine Palms, California ("KVMD" or the "Station") and Rancho Palos Verdes Broadcasters, Inc. ("RPVB"), the licensee of Station KXLA(TV), Rancho Palos Verdes, California ("KXLA" or the "Station") (KVMD and RPVB collectively the "Joint Parties," KVMD and KXLA collectively the "Stations") by their attorneys, hereby submit these Reply Comments in the above-referenced rule making proceeding concerning closed captioning of video programming and related compliance and quality issues raised in the Petition for Rulemaking filed by Telecommunications for the Deaf, Inc. ("TDI"). *See Notice of Proposed Rule Making*, FCC 05-142, released July 21, 2005 ("*NPRM*").

In these Reply Comments, the Joint Parties wish to add their support to the many proceeding participants who noted the detrimental impact the Commission's proposed closed captioning quality, monitoring and reporting requirements would have on small broadcasters. As the owners and operators of small, independent broadcast television Stations, the Joint Parties submit that the closed captioning rules proposed in the *NPRM* fail to strike an appropriate balance between the hearing-impaired community's needs on one hand, and the costs of closed

captioning to video programming providers and distributors on the other. Further, both Stations broadcast significant portions of bilingual and multilingual programming, including programs containing both English-language segments and Spanish or other-language segments as well as separate English-language and Spanish or other-language programs. The Joint Parties therefore seek clarification of the Commission's treatment of such bilingual and multilingual programming under the Commission's closed captioning rules. In support thereof, the Joint Parties state as follows.

The Joint Parties believe that the Commission's existing rules create a fair and efficient system for closed captioning of video programming and that the major overhaul advocated by TDI and proposed in the *NPRM* is unnecessary. While the Joint Parties recognize that closed captioning services remain less than perfect, the vast majority of closed captioning problems discussed in the *NPRM* are either *de minimis* in nature, or simply the unavoidable consequences of human error, and do not warrant the extensive regulation urged by TDI. In the *Closed Captioning and Video Description of Video Programming* proceeding, the Commission deliberately chose a balanced, pragmatic set of rules over stricter regulatory controls in order to promote cost-effective advances in the quantity and quality of closed captioning. See *Report and Order*, 13 FCC Rcd 3272, 3278 (1997) ("*R&O*") (balancing need for closed captioned programming against realities of video marketplace, including limited financial resources of video programming providers and limitations on supply of captioners); *Order on Reconsideration*, 13 FCC Rcd 19973 (1998) ("*Reconsideration Order*") (generally upholding rules against calls for stricter requirements). Since their adoption, these rules have helped to improve closed captioning for hearing-impaired television viewers without shifting an undue burden onto video programming providers. In the absence of any demonstrable evidence that the

proposed rules are necessary and will significantly improve closed captioning services, the Commission should not abandon its current rules for a new set of requirements that will significantly raise administrative costs.

The Joint Parties wish to join the extensive list of broadcast and non-broadcast organizations opposing the imposition of non-technical and technical quality standards as well as new monitoring and reporting requirements on grounds that such requirements will dramatically raise closed captioning costs without substantively improving closed captioning services. *See, e.g.,* Comments of the National Association of Broadcasters ("NAB"); Comments of Hubbard Broadcasting, Inc. ("Hubbard"); Comments of KJLA, LLC ("KJLA"); and Comments of National Cable & Telecommunications Association ("NCTA").

First, as a practical matter, technical and non-technical errors are simply a part of the captioning process and will remain so regardless of the imposition of official technical and non-technical captioning quality standards. Any small gains that exacting quality standards might achieve cannot justify the enormous "administrative burden" that extensive technical and non-technical monitoring requirements would entail. *R&O*, 13 FCC Rcd at 3374-3375.

Next, the Joint Parties submit that the proposed reporting requirements suffer the same cost-benefit imbalance as the proposed quality and monitoring requirements. New closed captioning rules requiring video programming distributors to complete compliance reports with their own certifications would presumably necessitate independent verification by programming distributors of the certifications provided by programming suppliers. Such verification, in addition to the efforts necessary to monitor and satisfy compliance report requirements, would impose substantial administrative burdens on video programming providers. In the *Closed Captioning and Video Description of Video Programming* proceeding, the Commission rejected

recordkeeping and reporting requirements as "unnecessarily burdensome and administratively cumbersome," and upheld this determination on reconsideration. *R&O*, 13 FCC Rcd at 3383; *Reconsideration Order*, 13 FCC Rcd at 20026-20027. The Commission's finding applies with equal force to the reporting requirements proposed in the *NPRM*.

Recordkeeping and compliance reporting requirements, like the proposed quality and monitoring rules, would unduly raise the administrative costs of closed captioning for the Commission as well as video programming distributors, particularly small independent broadcasters such as the Joint Parties. For many stand-alone operations, like the Stations, such rising costs (on top of the additional costs such Stations are already undertaking in connection with the transition to digital television) would detrimentally affect the quality of video programming itself without improving the quality of closed captioning services. Accordingly, the Commission should maintain its current rules rather than adopt a new set of onerous closed captioning requirements. In the event the Commission does adopt new requirements, the Commission must also adopt new exemptions to these requirements to ensure that small independent programming distributors, like the Joint Parties, are not saddled with unreasonable closed captioning costs that threaten the economic viability of their businesses.¹

Finally, the Joint Parties request that the Commission clarify the regulatory classifications assigned to bilingual and multilingual programming, specifically to stations that broadcast programs incorporating both English-language and Spanish or other-language segments, and to stations that broadcast separate English-language and Spanish or other-language programs. Currently, the Commission's benchmark approach to captioning assumes that English-language programming, Spanish-language programming and other-language programming are strictly

¹ In this regard, the Joint Parties would suggest substantially increasing the thresholds contained in Section 79.1(d)(11)-(12) of the Commission's Rules.

either/or in nature. The inclusion of English-language and Spanish or other-language segments within the same program, or separate English and Spanish or other-language programs on the same station, present novel captioning issues that should properly be addressed before the January 1, 2006 deadline for the closed captioning of 100% of new English-language programming.

The Joint Parties submit, for the reasons stated below, that programming containing both English-language and Spanish-language segments should be treated as Spanish-language programming. *See* 47 C.F.R. § 79.1(b)(3)(iv). Similarly, the Joint Parties submit that programming containing both English-language and other-language segments should qualify for the foreign language (other than Spanish) exemption from closed captioning requirements as other-language programming. *See* 47 C.F.R. § 79.1(d)(3).

The individual Spanish-language and other-language captioning markets are significantly less developed than the captioning market for English-language programming. In the *Reconsideration Order*, the Commission cited "logistical difficulties" associated with Spanish-language captioning and the extra time necessary for the Spanish-language captioning market to develop as reasons for the longer transition period for the captioning of Spanish-language programming. 13 FCC Rcd at 20015-20016. Even greater logistical difficulties and a nearly nonexistent captioning market explain the Commission's exemption of other foreign-language programming from the captioning rules. *See* 47 C.F.R. § 79.1(d)(3).

The market for bilingual and multilingual captioning is, of course, even less developed than the individual Spanish-language and other-language captioning markets. Captioning a program containing both English-language and Spanish or other-language segments requires

double the efforts of single language programming, and the pool of available captioners is doubly limited.

Given the relaxed deadlines for closed captioning of new Spanish-language programming set forth in Section 79.1(b)(3) of the Commission's Rules, many Spanish-language video program providers do not close caption all their programming fully. And given the exemption from closed captioning requirements for other foreign-language programming set forth in Section 79.1(d)(3) of the Commission's Rules, many other-language video program providers do not caption any of their programs at all. Stations seeking captioning for bilingual or multilingual programs thus face serious limitations. The Stations have found that Spanish-language and other-language video providers are not willing to close caption programs for single Stations when other Stations not required to meet closed captioning requirements do not require such efforts of them. Closed captioning services are thus not available at this time for many Spanish-language programs and nearly all the other-language programs that the Stations would broadcast. The Joint Parties request that the Commission respond to this unintended consequence of its Rules by providing the appropriate regulatory protection and guidance for broadcasters who serve the needs and interests of Spanish and other-language speakers.

Accordingly, the Joint Parties submit that bilingual English-Spanish programming should be subject to the appropriate Spanish-language phase-in schedule, and English-other-language programming should be exempt from captioning requirements, rather than subject to the English-language captioning deadline. As for stations that broadcast separate English and Spanish-language or other-language programs, these stations should be able to break their captioning obligations into separate parts and be subject to the January 1, 2006 100% requirement for their English-language programs and the appropriate percentage requirements (30% for 2004-2006

and 50% for 2007-2009) or exemptions for their Spanish-language or other foreign-language programs, respectively.

In sum, as small independent television broadcasters, the Joint Parties urge the Commission to retain its current captioning rules, which seek to balance the needs of the hearing-impaired community with the costs of captioning to video programming providers, rather than adopt the burdensome quality standards and monitoring and reporting requirements proposed in the *NPRM*. Additionally, the Joint Parties request that the Commission classify bilingual and multilingual programming as Spanish-language or other- language programming for purposes of the Commission's captioning phase-in schedules or exemptions, and subject stations that broadcast separate English-language and Spanish or other foreign-language programs to the respective captioning deadlines or exemptions.

WHEREFORE, for the foregoing reasons, the Joint Parties requests that the Commission (1) maintain its current closed captioning rules, and (2) clarify that it will treat programs that include both English-language and Spanish or other-language programs as Spanish-language or other-language programming for purposes of the Commission's captioning deadlines or exemptions, and allow stations that broadcast separate English-language and Spanish or other foreign-language programs to meet the respective English-language and Spanish or other-foreign language captioning deadlines or exemptions independently.

Respectfully submitted,

KVMD LICENSEE CO., LLC

**RANCHO PALOS VERDES
BROADCASTERS, INC.**

/s/ Barry A. Friedman

Barry A. Friedman
Thompson Hine LLP
1920 N Street, N.W., Suite 800
Washington, D.C. 20036-1600
Counsel for the Joint Parties

December 16, 2005

ATTACHMENT 2

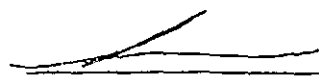
DECLARATION

I, Ronald L. Ulloa, declare under penalty of perjury that the following is true and correct:

1. I am President of KVMD Licensee Co., LLC ("KVMD"), the permittee of Station KVMD-DT, Twentynine Palms, California (the "Station").

2. The Station's programming includes Spanish-language programs, mixed Spanish/English-language programs and English-language programs. KVMD has encountered significant difficulty in obtaining closed captioning services for its bilingual English-Spanish-language programming. Given the relaxed deadlines for closed captioning of new Spanish-language programming set forth in Section 79.1(b)(3) of the Commission's Rules, many Spanish-language video program providers do not close caption all their programming fully. KVMD has found that Spanish-language video providers are not willing to close caption programs for single Stations when other Stations not required to meet the 100% requirement do not require such efforts of them. Closed captioning services are thus not available for many Spanish-language segments and programs that KVMD would broadcast.

3. Executed at Los Angeles, California this 22nd day of December, 2005.



Ronald L. Ulloa